

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

Royal Kenneth HAYES,

Petitioner,

v.

S.W. ORNOSKI, Acting Warden of San Quentin
 State Prison,

Respondent.

Case Number C 01 3926 MHP

DEATH-PENALTY CASE

ORDER DISPOSING OF CROSS-
 MOTIONS FOR SUMMARY
 JUDGMENT

[Docket Nos. 31 & 33]

Petitioner Royal Kenneth Hayes is an inmate on death row in California's San Quentin State Prison. His Amended Petition for Writ of Habeas Corpus contains ten claims for relief for alleged violations of his rights under the Sixth and Fourteenth Amendments.¹ In his final Status Report Regarding Exhaustion of Petitioner's Claim X, Petitioner withdrew Claim X from the Court's consideration. Presently before the Court are the parties' cross-motions for summary judgment on all remaining claims, Claims I through IX. The Court took the motions under

¹The Amended Petition originally contained eleven claims. In his Notice of Confirmation of Withdrawal of Claims, in addition to withdrawing multiple claims contained in his original Petition, Petitioner withdrew what was listed as Claim VIII in the Amended Petition (in which he challenged the trial court's decision to transfer the penalty phase of his trial to Stanislaus County rather than Marin County) and then renumbered the following claims as Claim VIII (asserting unjustifiable delay in state appellate proceedings); Claim IX (alleging cumulative error); and Claim X (referred to by the parties as the *Ring/Apprendi* claim).

1 submission without oral argument as the parties indicated that oral argument on the motions
2 would not be necessary. As explained below, the Court concludes that Respondent is entitled to
3 summary judgment on Claims I through IX and the Court grants Respondent's motion and denies
4 Petitioner's. Accordingly, subject to reconsideration, the Court will deny Petitioner's application
5 for a writ of habeas corpus and will grant judgment for Respondent.

6 I. BACKGROUND

7 The following recitation of the background of this case is based primarily on the Supreme
8 Court of California's opinion disposing of Petitioner's direct appeal, *People v. Hayes*, 989 P.2d
9 645 (Cal. 2000). The State court's factual determinations are "presumed to be correct" pursuant
10 to 28 U.S.C. § 2254(e)(1) (2005). In addition, with immaterial exceptions, they are confirmed by
11 this Court's independent review of the record. *Cf. Earp v. Stokes*, — F.3d —, No. 03-99005,
12 2005 WL 2159051, at *2 n.3 (9th Cir. Sept. 8, 2005).

13 On or about December 26, 1981, Deborah Garcia dug two shallow holes at a remote
14 location in the forest on the Santa Cruz campus of the University of California and she bought
15 two bags of oyster-shell gardening lime at a garden shop. According to Garcia, she believed that
16 the holes, which Petitioner had directed her to dig, were to be used to hide packages; Petitioner
17 had used such holes in the past to hide packages. Later that day or perhaps the next day or so,
18 according to Garcia, Petitioner telephoned her to meet him on December 29, 1981, so that they
19 could bury the packages.

20 According to Diane Weller, on December 27, 1981, in Millbrae, California, in the
21 presence of Weller and Lauren de Laet, Donald MacVicar gave Petitioner \$160,000 towards
22 \$250,000 for cocaine that MacVicar was led to believe would be delivered at a house in a remote
23 location in Santa Cruz. Later that day, Petitioner, who sometimes went by the code name
24 "Penguin," told Weller that she was to accompany him to Santa Cruz two days later to kill
25 MacVicar and Laet with a gun and silencer from a friend in Minnesota that Petitioner was to
26 receive on the intervening day. Larry Dahl arrived in Millbrae from Minnesota on December 28,
27 1981, with a pistol and silencer from Jim Johnson.

28 On December 29, 1981, Laet, Petitioner, MacVicar, and Weller drove to Santa Cruz,

1 where they met Garcia. The five of them then drove to the location in the forest where Garcia
2 had dug the shallow holes. MacVicar and Laet were told that they had to be searched before
3 going to the house where delivery of the cocaine was to occur. Petitioner instructed Weller to
4 remain in the car. MacVicar was led to a tree. Petitioner instructed Garcia to search MacVicar
5 while he leaned against the tree. Petitioner shot and killed MacVicar with a single bullet to the
6 back of the head. Laet then was brought to the site and was shot twice in the head before she
7 died.

8 Garcia brought Weller from the car to the scene. Petitioner removed the victims' heads
9 and hands from their bodies, and the bodies were placed into the shallow holes that Garcia
10 previously had dug, although the holes had to be enlarged. The oyster-shell gardening lime,
11 which Petitioner believed to be quicklime, was spread over the bodies to hasten decomposition
12 and the graves were covered with dirt, brush, and leaves. The severed body parts were placed in
13 plastic bags and left nearby. Petitioner, Garcia, and Weller later disposed of their clothes, the
14 guns, and other evidence at other locations.

15 A mushroom hunter discovered fragments of what later turned out to be Laet's skull on
16 February 20, 1982, and law-enforcement personnel began to investigate. On March 10, 1982,
17 Garcia, fearing for her life and for the safety of her family, filed a criminal complaint against
18 Petitioner, contending that Petitioner falsely imprisoned her, assaulted her with a deadly weapon,
19 and threatened to kill her the day before. She also informed the police of her, Petitioner's, and
20 Weller's involvement in the murders. Garcia led the police to the location of the bodies;
21 MacVicar's body was found that day; Laet's was found the next day. A second mushroom
22 hunter found MacVicar's skull on March 18, 1982.

23 Petitioner was arrested, asserted his innocence, and, after lengthy pretrial proceedings,
24 went to trial in the Santa Cruz County Superior Court on December 3, 1984. The chief
25 prosecution witnesses were Weller, who admitted knowingly aiding and abetting the murders,
26 and Garcia, who claimed not to know that any homicide-related conduct was occurring before
27 MacVicar was shot. Weller and Garcia, each of whom claimed to have acted under Petitioner's
28 domination and to have feared him, testified about their relationships with him (including

1 significant violence and threats against them) and about various drug-related criminal activities,
2 purportedly involving the Mafia and the CIA, in which they and others had participated with
3 Petitioner over the two to four years prior to the murders.

4 Diane Edwards, Garcia's mother, was unable to testify at the trial because of her health,
5 so her preliminary-hearing testimony was read to the jury. Edwards's testimony was consistent
6 with Garcia's; in particular, Edwards testified about Petitioner's unusual interest in the discovery
7 of the first skull in the Santa Cruz forest, his request that she collect newspaper stories about the
8 skulls and the investigation, and his subsequent threats against her.

9 Sondra Johnson, Jim Johnson's spouse, also testified consistently with Weller and Garcia.
10 She recounted the events surrounding her spouse, at Petitioner's request, purchasing the gun and
11 building the silencer that were used in the murders. She stated that it was she who contacted
12 Dahl to have him drive the gun and the silencer from the Johnsons' home in Minnesota to
13 Petitioner in California. Sondra Johnson also testified that she went to Miami to mail an
14 envelope to Petitioner in Hawai'i; this envelope, which she received from Dahl, was found to
15 have contained a letter from Laet, written at Petitioner's direction, that said that Laet and
16 MacVicar were having a wonderful time in Florida and preparing to leave the country. Finally,
17 Sondra Johnson reported that Petitioner had admitted that he killed two people in California
18 whose bodies had been chopped up.

19 Petitioner's defense was that the murders were committed by Weller, Garcia, and Dahl,
20 who had become the boyfriend of one of the prosecution witnesses between the time of the
21 murders and Petitioner's arrest. Petitioner claimed that he was framed to deflect blame away
22 from Dahl.

23 On February 5, 1985, Petitioner's jury convicted him of the first-degree murders of Laet
24 and MacVicar and found true a multiple-murder special-circumstance allegation and an
25 allegation that Petitioner personally used a firearm during the commission of the murders. The
26 jury also convicted Petitioner of the March 9, 1982, false imprisonment of and assault with a
27 deadly weapon on Garcia and of possession of cocaine on the date of his arrest, March 10, 1982.
28 The jury was unable to agree on the penalty for the murders.

1 On May 29, 1986, a jury in the Stanislaus County Superior Court, to which the case had
 2 been transferred on Petitioner's motion for a change of venue, returned a penalty verdict of death.
 3 The trial court denied Petitioner's motion for modification of the penalty and imposed a
 4 judgment of death on August 8, 1986.

5 During the pendency of Petitioner's automatic direct appeal to the California Supreme
 6 Court, Petitioner filed a petition for a writ of habeas corpus with the California Supreme Court,
 7 which the court denied "on the merits" in an unexplicated order filed on July 21, 1999. The court
 8 subsequently affirmed the judgment against Petitioner in all respects in a reasoned opinion on
 9 December 23, 1999; it modified its opinion and denied rehearing on February 16, 2000.
 10 Petitioner next sought a writ of certiorari from the United States Supreme Court, which denied
 11 such writ on November 6, 2000. On October 16, 2001, Petitioner initiated the present action
 12 seeking a writ of habeas corpus in United States District Court.²

13 II. LEGAL STANDARD

14 The Court shall grant a motion for summary judgment if the moving party demonstrates
 15 "that there is no genuine issue as to any material fact and that the moving party is entitled to
 16 judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court "shall not" grant a petition for a
 17 writ of habeas corpus on behalf of a person in custody pursuant to a State court judgment with
 18 respect to any claim that a State court adjudicated on the merits unless that court's adjudication
 19 of the claim "resulted in a decision that was contrary to, or involved an unreasonable application
 20 of, clearly established Federal law, as determined by the Supreme Court of the United States" or
 21 "resulted in a decision that was based on an unreasonable determination of the facts in light of
 22 the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d) (2005).

23 III. CLAIMS FOR RELIEF

24 A. CLAIM I

25 The Sixth Amendment guarantees that "In all criminal prosecutions, the accused shall
 26

27 ²The Court stayed the present action from April 1, 2003, to March 10, 2004, for Petitioner to
 28 return to the California Supreme Court to exhaust Claim X in his Amended Petition. As noted, Petitioner
 has withdrawn that claim from the Court's consideration.

1 enjoy the right to . . . a trial, by an impartial jury. . . .” U.S. Const. amend. VI. This right is
2 incorporated into the Fourteenth Amendment, which ensures fair trials for criminal defendants
3 with its provision that “No State shall . . . deprive any person of life, liberty, or property, without
4 due process of law. . . .” U.S. Const. amend. XIV § 1; *see Sheppard v. Maxwell*, 384 U.S. 333,
5 362 (1966) (“Due process requires that the accused receive a trial by an impartial jury free from
6 outside influences.”). In Claim I in his Amended Petition, Petitioner alleges that he was deprived
7 of his Federal constitutional rights to a fair trial and an impartial jury by the trial court’s denial of
8 his motion for a change of venue for the guilt phase of his trial. The California Supreme Court
9 denied this claim on the merits in its opinion disposing of Petitioner’s direct appeal. 989 P.2d at
10 668-70.

11 At his arraignment, Petitioner moved for a change of venue from Santa Cruz County.
12 The motion was based on the extensive countywide publicity in the print media and on the radio
13 and television regarding the discovery of the victims’ remains, the arrest of Petitioner, and
14 subsequent events. Petitioner noted that the media had disclosed highly prejudicial information
15 that would be inadmissible at trial, including the facts that Petitioner twice had been acquitted of
16 prior homicides, once on the grounds of insanity, and that the chief prosecution witnesses had
17 passed lie-detector tests. The trial court denied the motion without prejudice, recognizing that a
18 change of venue would have been appropriate if the trial were to have commenced at the time of
19 the motion, but stating that as time went by there would be less likelihood that Petitioner could
20 not receive a fair trial in Santa Cruz County.

21 Petitioner renewed his motion eighteen months later after almost three weeks of voir dire
22 of prospective jurors. Two months after that, Petitioner supplemented his motion with additional
23 supporting materials that reflected current publicity about juror selection, the commencement of
24 the trial, and Petitioner’s recent marriage; these materials included local newspaper editorials
25 decrying the amount of money spent on trials for “Trailside Killer” David Carpenter and
26 Petitioner. *See Carpenter v. Ornoski*, No. C 98 2444 MJJ JL (N.D. Cal. filed June 19, 1998).

27 The trial court denied the motion the day before trial began. The judge commented that
28 the exposure to pretrial publicity was less than had been anticipated and that many prospective

1 jurors knew nothing about the case; moreover, the court had passed the selected jurors for cause
2 because the judge was satisfied that the selected jurors would be fair and that those who had been
3 exposed to pretrial publicity recalled very little about the case, would disregard the publicity, and
4 had not formed opinions as to Petitioner's guilt or innocence.

5 In the storied *Sheppard* case, the United States Supreme Court held that "where there is a
6 reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should
7 continue the case until the threat abates, or transfer it to another county not so permeated with
8 publicity." 384 U.S. at 363. A "barrage of inflammatory publicity immediately prior to trial
9 amounting to a huge wave of public passion" may establish such a likelihood. *Patton v. Yount*,
10 467 U.S. 1025, 1033 (1984) (internal quotation marks and citations omitted).

11 This Court's independent review of the record reveals that the California Supreme Court
12 correctly concluded that "substantial evidence supports the ruling of the trial court" in denying
13 Petitioner's motion for a change of venue. 989 P.2d at 669; *see id.* at 669-70 (summarizing
14 evidence). First, while the trial judge expressed concerns about the costs associated with a
15 change of venue—and even apparently considered the costs despite the inappropriateness of
16 doing so—he indicated that such costs would not prevent him from granting a change of venue if
17 there were a reasonable likelihood that a fair trial could not be held in Santa Cruz County;
18 relatedly, there is nothing to suggest that any seated juror had knowledge of or considered the
19 costs of the trial or had any bias because of the costs. Second, contrary to Petitioner's
20 contentions, most of the relevant news coverage was neither lurid nor sensationalistic: indeed, as
21 the State court found, "the print and television media articles were factual, not inflammatory.
22 There was no sensationalism beyond reporting the fact that the heads and hands had been
23 removed from the bodies." *Id.* at 670. Third, "[m]uch of the publicity occurred almost three
24 years before jury selection began" and the publicity was relatively "sporadic." *Id.* As in *Yount*,
25 "this lapse in time had a profound effect on the community and, more important, on the jury, in
26 softening or effacing opinion," 467 U.S. at 1033, for "time soothes and erases," *id.* at 1034:
27 several prospective jurors had moved to the county after the murders; many others had no
28 recollection of reading about or seeing television news coverage about them; few who did recall

1 the initial publicity remembered anything other than nonprejudicial facts such as that the bodies
 2 had been found on the University of California's campus in Santa Cruz, that Petitioner's first
 3 name is Royal, that mushroom hunters discovered the victims' bodies, or that real estate, drugs,
 4 and Hawai'i (where Petitioner, Weller, and Garcia had lived) somehow were involved in the
 5 case; and few were aware of Petitioner's prior homicide acquittals, 989 P.2d at 669.

6 The California Supreme Court correctly determined that the trial court's denial of
 7 Petitioner's motion for a change of venue of the guilt phase of his trial did not deprive him of his
 8 right to an impartial jury at the guilt phase of his trial. The State court's determination having
 9 been correct, Respondent is entitled to summary judgment on Claim I.

10 B. CLAIM II

11 In addition to guaranteeing an accused's right to trial by jury, the Sixth Amendment
 12 provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted
 13 with the witnesses against him. . . ." U.S. Const. amend. VI. This right, like the right to trial by
 14 an impartial jury, is incorporated into the Fourteenth Amendment's Due Process Clause. *Pointer*
 15 *v. Texas*, 380 U.S. 400 (1965). In Claim II in his Amended Petition, Petitioner alleges that he
 16 was deprived of his Federal rights to due process and of confrontation by the prosecution's
 17 invocation of Dahl's Federal conviction to bolster Weller's³ credibility and to insinuate
 18 Petitioner's guilt. The California Supreme Court denied this claim on the merits in its opinion
 19 disposing of Petitioner's direct appeal. 989 P.2d at 681-82.

20 During her opening statement, the prosecutor told the jury that it would hear evidence
 21 about Dahl's involvement in the events leading up to the murders and that Dahl had been
 22 convicted in Federal court of transporting firearms. Petitioner did not object to any statement in
 23 this part of the opening statement. The prosecutor subsequently asked Weller several questions
 24 regarding her past testimony against Dahl at his trial for transporting firearms. When Weller said
 25 "yes" in response to the prosecutor's question as to whether Dahl subsequently had been
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27 ³Although the text of Claim II in the Amended Petition states that "Petitioner was deprived of his
 28 Federal rights of due process and his right of confrontation by the prosecution's invocation of Larry
 Dahl's Federal conviction to bolster *his* credibility and to insinuate Petitioner's guilt" (emphasis added),
 it is clear from the discussion of this claim that it is Weller's credibility that is meant.

1 convicted, Petitioner objected to Weller's response as hearsay. The trial court sustained the
2 objection.

3 In discussing this claim, the California Supreme Court reasonably "infer[red] that the
4 confrontation claim is based on the hearsay nature of the evidence that Dahl had been convicted."
5 As that court correctly noted, "The [trial] court immediately sustained the hearsay objection" and
6 Petitioner "was afforded the opportunity to confront and cross-examine Weller." *Id.* at 682.

7 Petitioner contends that Weller's testimony that Dahl was convicted following her
8 testimony against him bolstered her credibility because it suggested that another jury believed her
9 prior testimony. However, by sustaining the objection, the trial judge removed this statement
10 from consideration by Petitioner's jury. Moreover, even assuming misconduct on the part of the
11 prosecutor and assuming that the jury considered Weller's statement despite the sustaining of the
12 hearsay objection, the jury already would have had to find Weller credible in order to give this
13 statement any credence; if the jury did so, the statement could not have served to bolster Weller's
14 credibility further; if the jury did not do so, then the statement would have been disregarded;
15 either way, the statement necessarily had no effect on the jury's determination of Weller's
16 credibility. Thus, this Court's independent review of the record confirms that the California
17 Supreme Court correctly concluded that "[t]he possibility that the jury may have concluded that
18 Weller was truthful in her testimony regarding [Petitioner] because another jury convicted Dahl
19 after her testimony about delivery of the gun is too remote to warrant the inference of prejudice"
20 that Petitioner would draw. *Id.*

21 This Court agrees with the State court that "[t]here was no Sixth Amendment violation"
22 here. *Id.* A fortiori, Respondent is entitled to summary judgment on Claim II.

23 C. CLAIM III

24 In Claim III, Petitioner alleges that he was deprived of due process and a fair trial by the
25 trial court's refusal to declare a mistrial after Weller improperly volunteered a statement about
26 being the object of a murder-for-hire plot. The California Supreme Court denied this claim on
27 the merits in its reasoned opinion disposing of Petitioner's direct appeal. *Id.* at 678.

28 On the second day of Petitioner's trial, defense counsel raised a question with the trial

1 court about a reference the prosecutor had made to an alleged jailhouse informant. The
2 prosecutor said that the alleged informant's attorney had stated that Petitioner had "offered
3 money in the sum of \$50,000 to do away with two witnesses in the case," but the prosecutor did
4 not feel that this information was sufficiently reliable to use it at trial. The trial judge then
5 instructed the prosecutor, "Don't use it for any purpose."

6 The prosecutor subsequently asked Weller why she had not gone to the police about the
7 killings when she was in Minnesota and Petitioner was elsewhere. Weller responded that she
8 was scared that Petitioner would have her killed. When the prosecutor asked whether she had
9 received any actual threats, Weller stated that Petitioner had threatened to kill her if she ever said
10 anything about what happened in California. Weller then volunteered, "a day or two after Jim
11 Johnson was arrested, Sondra Johnson said there was a contract out on me for \$25,000 from
12 Kenny Hayes." Defense counsel immediately objected to the volunteered statement as hearsay.
13 The prosecutor argued that the statement was not hearsay because it was being offered not for its
14 truth but to show that Weller believed that she had reason to fear for her life. The trial court
15 sustained the objection and told the jury that the volunteered comment "should be stricken from
16 your minds."

17 After the jury was excused, Petitioner moved for a mistrial on the ground that the jury
18 heard the volunteered statement, which was highly prejudicial and virtually impossible to rebut.
19 Defense counsel referred to the trial court's prior ruling that information about contracts not be
20 used; the judge indicated that that ruling had to do with the alleged jailhouse informant or
21 Petitioner's past history as a contract killer. The judge noted that the volunteered statement was
22 "very prejudicial" and "the worst kind" of hearsay, but concluded that "I sustained the objection
23 on that basis. I don't think it would justify a mistrial or as grounds for a mistrial."

24 Petitioner relies on *Dudley v. Duckworth*, 854 F.2d 967 (7th Cir. 1988), and *Mason v.*
25 *Hanks*, 97 F.3d 887 (7th Cir. 1996), in arguing that the trial court's refusal to declare a mistrial
26 denied him a fair trial. However, *Dudley* and *Mason* are inapposite, as the trial courts in those
27 cases admitted challenged testimony as evidence over objections by defense counsel; in
28 Petitioner's case, the trial court sustained defense counsel's hearsay objection. While Weller's

1 After hearing from law-enforcement officers responsible for court security and for
2 maintaining custody of Petitioner while he was confined in the Santa Cruz County jail, the trial
3 court permitted, over defense objection, the posting of additional deputies and the screening of
4 all persons who entered the courtroom in a manner similar to that used at airports. Prospective
5 jurors were screened until the actual jury was selected; jurors subsequently were not screened.

6 The United States Supreme Court recently held that “the Fifth and Fourteenth
7 Amendments prohibit the use of physical restraints visible to the jury absent a trial court
8 determination, in the exercise of its discretion, that they are justified by a state interest specific to
9 a particular trial.” *Deck v. Missouri*, 125 S. Ct. 2007, 2012 (2005). However, “the deployment
10 of security personnel during trial is not the sort of inherently prejudicial practice that, like
11 shackling, should be permitted only where justified by an essential state interest specific to each
12 trial.” *Id.* at 2011 (internal quotation marks and citations omitted). The security measures
13 employed at Petitioner’s trial were not of a kind that required the trial court to determine
14 specifically whether or not they were appropriate at Petitioner’s trial. *See Holbrook v. Flynn*, 475
15 U.S. 560, 569 (1986) (“While shackling and prison clothes are unmistakable indications of the
16 need to separate a defendant from the community at large, the presence of guards at a defendant’s
17 trial need not be interpreted as a sign that he is particularly dangerous or culpable.”).
18 Nevertheless, the trial judge permitted the security measures only after hearing specific “concerns
19 that [Petitioner] might escape and for the security of witnesses who allegedly had been
20 threatened. . . .” 989 P.2d at 680 n.16.

21 The California Supreme Court correctly observed that the record “suggests that those
22 prospective jurors who were questioned about the subject during voir dire viewed [the screening]
23 as a routine procedure like that at an airport,” *id.* at 680, and that “[n]o juror who actually sat on
24 the case is identified as being a person who believed that the security precautions were instituted
25 because the defendant was dangerous,” *id.* at 681. Thus, that court correctly concluded that
26 Petitioner “has not demonstrated actual prejudice, and we find nothing in the description of the
27 security measures utilized at his trial . . . that is so inherently prejudicial as to warrant a
28 conclusion that in reaching a verdict the jurors might have been affected by their observation of

1 those measures.” *Id.*

2 The security measures used at Petitioner’s trial were appropriate; thus, the State court
3 correctly denied Petitioner relief on this claim. Accordingly, Respondent is entitled to summary
4 judgment on Claim VI.

5 F. CLAIM VII

6 In Claim VII, Petitioner contends that he was deprived of due process and a fair trial by
7 the trial court’s refusal to instruct that Garcia was an accomplice as a matter of law. The
8 California Supreme Court denied this claim on the merits in its opinion disposing of Petitioner’s
9 direct appeal. *Id.* at 682-84.

10 The California Penal Code requires that the testimony of an accomplice be corroborated.
11 Cal. Pen. Code § 1111 (West 1985). As Petitioner observes, a State trial court in California may
12 and must instruct that a prosecution witness is an accomplice as a matter of law only where the
13 evidence requires that as the only reasonable inference: as the State court explained in denying
14 Petitioner relief on this claim, “whether a witness is an accomplice is a question of fact for the
15 jury in all cases unless there is no dispute as to either the facts or the inferences to be drawn
16 therefrom.” 989 P.2d at 682 (internal quotation marks and citation omitted).

17 Petitioner contends that the trial judge erred in not instructing the jury that Garcia was an
18 accomplice as a matter of law; as a result, the jury did not find corroboration of Garcia’s
19 testimony beyond a reasonable doubt, thereby depriving Petitioner of a fair trial. *Cf. Carmell v.*
20 *Texas*, 529 U.S. 513 (2000). However, this Court’s independent review of the record confirms
21 that Garcia credibly denied that she knew of Petitioner’s intent to kill: this fact compels the
22 conclusion that it actually would have been erroneous for the trial court to instruct that Garcia
23 was an accomplice as a matter of law because the evidence as to whether she was an accomplice
24 was ambiguous. Moreover, Garcia’s testimony was corroborated by Sondra Johnson’s testimony
25 regarding the delivery of the murder weapon, Petitioner’s instructions to mail the letter written by
26 Laet from Florida to Hawai`i (to try to cover up the murders), and Petitioner’s admission that he
27 killed two people in California whose bodies had been chopped up, along with Edwards’s
28 testimony demonstrating Petitioner’s interest in and response to the discovery of the first skull

1 and the ensuing investigation.

2 The California Supreme Court correctly determined that the trial court was not erroneous
3 in refusing to instruct that Garcia was an accomplice as a matter of law. Accordingly,
4 Respondent is entitled to summary judgment on Claim VII in the Amended Petition.

5 G. CLAIM VIII

6 One component of the Fourteenth Amendment's guarantee that a person may not be
7 deprived of life or liberty "without due process of law," U.S. Const. amend. XIV § 1, is the Sixth
8 Amendment's provision of a criminal defendant's right "to have the Assistance of Counsel for
9 his defence," U.S. Const. amend. VI. *Gideon v. Wainwright*, 372 U.S. 335 (1963). "It has long
10 been recognized that the right to counsel is the right to the effective assistance of counsel."
11 *McMann v. Richardson*, 397 U.S. 759 (1970). In addition, "[w]hile the Sixth Amendment
12 guarantees the accused a speedy *trial*, excessive delay in the *appellate* process may also rise to
13 the level of a due process violation." *Coe v. Thurman*, 922 F.2d 528, 530 (9th Cir. 1991)
14 (emphasis on original). In Claim VIII, Petitioner asserts that he has been deprived of the
15 effective assistance of counsel and appellate due process by an unjustifiable delay in the state
16 appellate proceedings.

17 The California Supreme Court received Petitioner's judgment of death and docketed his
18 automatic appeal on August 26, 1986. The court appointed H. Peter Young, Esq., to represent
19 Petitioner on December 10, 1986. The record-completion proceedings were concluded on
20 January 13, 1993, when the certified record was filed. Young requested and received numerous
21 extensions of time to file Petitioner's opening brief on appeal before the court relieved him of his
22 appointment on April 4, 1995. The court subsequently appointed Eric S. Multhaup, Esq., on July
23 16, 1995.⁴ Multhaup filed Petitioner's opening brief on July 31, 1997.

24 The period from the initiation of the automatic appeal to the filing of Petitioner's opening
25 brief lasted nearly eleven years. Petitioner concedes that four of the years used for the record-
26 completion process plus the two years that Multhaup used to prepare the opening brief (for a total

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28 ⁴Multhaup continues to represent Petitioner in the present federal habeas proceedings pursuant to
an order of this Court on November 5, 2001, appointing him nunc pro tunc to October 15, 2001.

1 of six years) were reasonable uses of time. However, he contends, the three additional years used
 2 for the record-completion process plus the two subsequent years during which Young conducted
 3 substantial work on Petitioner's appeal but did not produce a draft brief—a total of five years—
 4 constitute an unjustified delay, due in part to the ineffective assistance of counsel, that denied
 5 him appellate due process; as a result, Petitioner experienced “oppressive incarceration pending
 6 appeal” as well as “anxiety and concern . . . awaiting the outcome of the appeal,” *id.* at 532.⁵

7 Assuming without deciding that Petitioner's appellate due-process rights were violated as
 8 Petitioner contends, the remedy in a habeas proceeding would be an order “that the petitioner be
 9 released unless the appeal is heard within a set time,” not, as Petitioner urges, that he be granted a
 10 new trial. *Id.* However, Petitioner already has had his appeal heard and denied; the Court
 11 therefore is unable to provide a remedy for the alleged violation. Accordingly, Respondent is
 12 entitled to summary judgment on Claim VIII.⁶

13 H. CLAIM IX

14 In Claim IX, Petitioner asserts that he was deprived of due process and a fair trial by the
 15 cumulative effect of the multiple errors he has identified at the guilt phase of his trial. The
 16 California Supreme Court denied this claim on the merits in its opinion disposing of Petitioner's
 17 direct appeal. 989 P.2d at 693. This Court, like the State court, has “concluded that no
 18 prejudicial error occurred.” *Id.* There having been no prejudicial error, there is no cumulative
 19 effect of errors, and Respondent is entitled to summary judgment on Claim IX.

20 IV. DISPOSITION

21 The Court has determined that Respondent is entitled to summary judgment on the
 22 remaining claims in Petitioner's Amended Petition for Writ of Habeas Corpus, Claims I through
 23 IX. Accordingly, the Court grants Respondent's Motion for Summary Judgment on these claims

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 25 ⁵Petitioner initially argued that Young's ineffective assistance and the delay in the appeal also
 26 impaired Petitioner's “grounds for appeal or . . . the viability of his defense in case of retrial,” *Coe*, 922
 27 F.2d at 532. However, in his brief replying to Respondent's opposition to his motion and opposing
 Respondent's motion, Petitioner concedes that there was no such impairment.

28 ⁶Petitioner is not entirely without the prospect of a remedy for the claimed violations of his
 appellate due-process rights: while he may not obtain habeas relief, he may bring a suit for damages
 pursuant to 42 U.S.C. § 1983 (2005). *See Badea v. Cox*, 931 F.2d 573, 574 (9th Cir. 1991).

1 and denies Petitioner's Motion for Summary Judgment on these claims.

2 Petitioner shall file any motion for leave to file a motion for reconsideration of this order
3 pursuant to Civil Local Rule 7-9 not later than thirty days after receipt of this order. If Petitioner
4 files such a motion, Respondent shall file any response not later than thirty days after Petitioner's
5 motion is served. The Court will take the motion under consideration upon receipt of
6 Respondent's response or upon the expiration of the time for Respondent to respond.

7 If Petitioner does not file a motion for leave to file a motion for reconsideration within the
8 time specified, the Court will deny Petitioner's application for a writ of habeas corpus and render
9 judgment for Respondent forthwith.

10 *It is so ordered.*

11
12
13 DATE: October 26, 2005

14 
MARILYN HALL PATEL
United States District Judge

1 Copies of Order e-mailed on _____ to:

2 Eric S. Multhaup, Esq.
20 Twenty Sunnyside Avenue, Suite A
3 Mill Valley, CA 94941

4 Bill Lockyer, Esq.
Lloyd G. Carter, Esq.
5 Office of the Attorney General
2550 Mariposa Mall, Room 5090
6 Fresno, CA 93721

7 Habeas Corpus Resource Center
50 Fremont Street, Suite 1800
8 San Francisco, CA 94105

9 Federal Court Docketing
California Appellate Project
10 101 Second Street, Suite 600
San Francisco, CA 94105
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